Supreme Court, U.S.
FILED
FEB 14 1995
OFFICE OF THE CLERK

(6)

No. 94-956

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1994

THE MUNICIPAL UTILITIES BOARD
OF ALBERTVILLE, ALABAMA, *et al.*,
Petitioners,

v.

ALABAMA POWER COMPANY, *et al.*,
Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Eleventh Circuit

REPLY BRIEF OF PETITIONER CITIES

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REPLY BRIEF OF PETITIONER CITIES

Petitioner Cities reply to briefs in opposition to *Certiorari*. In their Petition and below, Cities alleged that Respondent power companies and cooperatives entered into agreements to divide territories for the sale of electricity in violation of the Sherman Act.

In response to the opposition briefs, Cities reply 1) that Cities contest *only* Respondents' actions; 2) that, under *Parker*,[1] Respondents cannot claim immunity for private actions that violate the Sherman Act where the state merely seeks to ratify trade restraints; 3) that Respondents' actions are subject to and fail scrutiny under *Midcal*;[2] 4) that the absence of state agency review requires an even more rigorous examination of the legislature's

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[1]*Parker v. Brown*, 317 U.S. 341 (1943).
[2]*California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980).

alleged supervision of the Respondents' conduct; and 5) that this evaluation can be made by examining the acts, not the motives of the legislature.

If the opinion below is permitted to stand, a dangerous, unintended expansion of the state action doctrine will result. Without summary reversal or full review by this Court, antitrust violators will have a new pathway for immunizing private agreements in restraint of trade whenever the violators are powerful enough to obtain protective legislation.

I. PETITIONERS CHALLENGE ACTIONS OF RESPONDENTS, NOT OF THE STATE

In their briefs, Respondent power companies contend that Petitioners are attacking actions of the state.[3] Peti-

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[3] *Alabama Power Company* ("APC Brief") at 10; Alabama Rural Electric Association of Cooperatives ("Alabama Rural Brief") at 8-9; Black Warrior Electric Membership ("Black Warrior Brief") at 5-6.

tioners are instead attacking the conduct of Respondents to divide territories. After agreeing to divide territories, Respondents sought antitrust immunity on their own behalf to enter into the territorial agreements and to implement them.[4] Petitioner Cities contest Respondents' claim of immunity under the state action doctrine for their *private* acts. As this Court stated in *Ticor*,

> [a]ctual state involvement, not deference to private [agreements] under the general auspices of state law is the precondition for immunity from federal law.

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[4]In their complaint, Petitioners did allege that the conduct of state officials was such as to fall within the "co-conspirator" exception to *Parker*, 317 U.S. at 351-352. After this Court held in *City of Columbia v. Omni Outdoor Advertising, Inc.*, 499 U.S. 365 (1991), that the co-conspirator doctrine does not limit the state action doctrine, the 11th Circuit withdrew its decision holding that Petitioner Cities had alleged a valid co-conspirator claim. The unavailability of a limitation to the *Parker* state action doctrine in situations where the state and private parties are co-conspirators makes it more important that the *Midcal* requirements of "clear articulation" and "active supervision" be strictly applied.

FTC v. Ticor Title Ins. Co., 112 S. Ct. 2169, 2176-77 (1992).

II. *PARKER* DOES NOT PERMIT STATES TO AUTHORIZE ANTITRUST VIOLATIONS

The *Parker* doctrine permits states to enact regulatory legislation or to order monopoly service to substitute for competition. *Ticor*, 112 S.Ct. at 2176-77. To resolve the tension between *permitting* states to pass economic legislation that limits the operations of the market place and *preserving* the force of federal antitrust laws, *Parker* establishes that:

> a state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful...

317 U.S. at 351. This principle remains the cornerstone of the *Parker* doctrine. *See, e.g.*, cases in Cities' Petition at 18-19.

Despite Respondents' characterizations, the Territorial Acts serve to ratify private anticompetitive conduct. Petitioners contend that Respondents 1) entered into overall agreements to divide markets; 2) incorporated by reference additional private territorial agreements as part of their overall market agreement; and 3) continue today to allocate customers privately and otherwise to implement their private agreements, all without any state supervision or review. Ratification of this type of trade restraint is manifestly impermissible under *Parker*. Were the law contrary, any industry would be free to fix prices, divide territories, or otherwise violate the antitrust laws if the industry were able to persuade a state to ratify its private, unlawful agreements. This thesis was rejected in *Parker*, was rejected in con-

nection with the related *Noerr-Pennington* doctrine,[5] and must be rejected here.

III. RESPONDENTS' ACTIONS ARE SUBJECT TO THE *MIDCAL* TWO-PRONG TEST

Respondents rely on *Hoover v. Ronwin*, 466 U.S. 588 (1984), as exempting all actions undertaken by the state legislature from the two-part test of *Midcal*.[6] Respondents claim that when a state acts by legislation, the requirements of *Parker*, *Midcal* and *Ticor* do not apply.[7]

While the state action doctrine of *Parker v. Brown* does not normally reach the *actions* of the states themselves, the doctrine is crystal clear that the *Midcal* test must be stringently applied when

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[5] *E.g.*, *FTC v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411, 425 (1993), explaining *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961); *United Mine Workers v. Pennington*, 381 U.S. 657 (1965). *See* Petition at 12, 15-16.

[6] APC Brief at 10; Alabama Rural Brief at 8; Black Warrior Brief at 6.

[7] Alabama Rural Brief at 8; Black Warrior Brief at 5-8.

analyzing *private* anticompetitive agreements and conduct allegedly protected by state action. *Midcal*, 445 U.S. 97. *Midcal* and subsequent cases require clear articulation of state policy and meaningful supervision to ensure that actions otherwise illegal under the antitrust laws are, in fact, implementing decisions of the state, and are not simply furthering the interests of private parties.[8] The cited cases provide no exception merely because the state acts by legislation.

A. Summary Reversal Is Warranted

This case comes to this Court from the rulings of the courts below on Respondents' motions to dismiss or for summary judgment.[9] Petitioners seek summary reversal under *Ticor*, particularly

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[8]*E.g.*, *Ticor*, 112 S. Ct. at 2176-77; *Patrick v. Burget*, 486 U.S. 94 (1988); *Midcal*, 445 U.S. at 105.

[9]Appendix A, 4a; Appendix B, 10a, 13a.

because the district court relied upon the Third Circuit's overturned *Ticor* opinion and the First Circuit's displaced opinion in *New England Motor Rate Bureau*.

Alabama Power Company argues that the district court adopted the appropriate active supervision standard.[10] To the contrary, the district court stated 1) that a federal court should not "scrutinize the rigor with which the state supervises the challenged activity to ensure that supervision is more than pro forma" *[quoting New England Motor Rate Bureau v. FTC*, 908 F.2d 1064, 1076 n. 18 (1st Cir. 1990)] and 2) that the "[a]vailability of the state action doctrine does not depend upon the quality of state supervision." [*quoting Ticor Title Ins. Co. v. FTC*, 922 F.2d 1122 (3rd Cir. 1991)]. (Appendix B,

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[10]APC Brief at 20. *See also* Alabama Rural Brief at 10-11.

19a-20a). As the May 23, 1994 Eleventh Circuit decision does not mention this Court's *Ticor* decision or otherwise cure the inappropriately applied supervision standard, summary reversal is warranted.

B. **The Acts Are Not Self-Executing**

Even applying *Ticor* correctly, there is insufficient supervision of the future conduct of the private parties. Respondents contend that the Territorial Acts are "self-executing" because the legislature has already decided the territorial boundaries.[11] However, the legislation provides no supervision of either past or future divisions of service territories or of customer allocations allegedly pursuant to them. Delivery points for retail electric service customers are hardly immutable. Each new residential or commercial

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[11]APC Brief at 15; *see also* Black Warrior Brief at 9.

building constructed near a territorial dividing line must be allocated to a specific electric supplier. This allocation will be done privately. Moreover, the statutory scheme does not even require boundary maps to be filed with any state agency or for any other public access to the maps, thereby eliminating any practical possibility for state supervision.[12]

Although the Respondent utilities, and the lower courts, interpret the Territorial Acts to require subsequent legislation whenever any party desires to

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[12]Further, the Acts' general requirement that new service be provided by the electric supplier whose January 1, 1984 distribution lines were "closer to" the premises to be served is deceptively imprecise. Ala. Code §§ 37-14-3(1), 37-14-32(1) (76a-77a; 101-102a). The Acts also permit the private parties to terminate the individual agreements on their own accord, thereby binding the parties to the allocations of the overall territorial agreement. Ala. Code § 37-14-36 (1992)(116a). As long as private parties are able to determine in their discretion when the agreements are terminated and, correspondingly, when the overall agreement comes into force, the parties control how territories are divided. *See also* Section V, *infra*.

change a private agreement, no mechanism is provided under which the state or any outside party can determine how customers are allocated. Private parties wanting electric service cannot be expected to wait for service until the legislature is in session. Grafting a requirement for subsequent legislative approval onto the entire Act, as well as the individual incorporated agreements, presumes that an imaginary trigger exists to notify the state or outside parties of changes to service designations or violations of the agreements. This is not even the gauzy cloak of *Midcal*.[13]

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[13]Areeda and Hovenkamp comment that the supervision requirement would only be met for private, subsequently drawn boundaries if a state regulatory agency with appropriate power "was required to approve or at least empowered to disapprove the proposed boundaries." Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 212.7c (1994 Supp.). They have not, as implied by Respondent Alabama Rural Electric Association of Cooperatives (Alabama Rural Brief at 11), commented on Petitioners' specific contention that the individual agreements are not actively supervised.

C. The Territorial Agreements Are Not The State's "Own"

Respondent Alabama Power Company contends that

> even if the incorporated agreements originated with private parties, however, *the State made them its own by including them in the Acts.*

APC Brief at 16 (emphasis added).

The market divisions, allegedly immunized by the legislative finding that they were "not inconsistent" with the purposes of the Acts, are no more the legislature's own than were the title insurance rates allowed to take effect pursuant to the "negative option" provisions at issue in *Ticor*. Where the private agreements that the legislature has allegedly made "its own" are not contained in the legislation, are not public documents or available in a public repository, and are not deemed by the legislature to be consistent with the purposes and poli-

cies of the legislation (but rather only "not inconsistent"), the active supervision prong of *Midcal* is not met.

IV. THE ABSENCE OF A REGULATORY SCHEME REQUIRES STRICT ADHERENCE TO *MIDCAL*

Respondents imply that the legislature does not need to be held to the same standard of active supervision as a regulatory agency created by it would be. To the contrary, the absence of state agency review requires an even more rigorous examination of alleged supervision. Without a designated state agency to supervise future private conduct, antitrust violators are even more free to restrain trade.

Starting with *Parker*, this Court has recognized the importance of having a clear mechanism to ensure that protected conduct is that of the state. *Accord*, *Cantor v. Detroit Edison Co.*, 428 U.S. 579 (1976). In *Parker*, the legislation at

issue established a state proration program for marketing raisins. The program

> derived its authority and efficacy from the legislative command of the state and *was not intended to operate or become effective without that command...*

317 U.S. at 349 (emphasis added).

This Court amplified the importance of having supervisory mechanisms in *Midcal*; there, this Court explained why the statute failed to immunize the wine producers' and wholesalers' conduct:

> The State neither establishes prices nor reviews the reasonableness of the price schedules; nor does it regulate the terms of fair trade contracts. The State does not monitor market conditions or engage in any "pointed reexamination" of the program.

445 U.S. at 105-06 (citations omitted).

Even *Hoover* reinforces the need for meaningful state regulation to exempt private parties from antitrust actions.

In that case, this Court rejected the claim that a state statute dealing with bar admissions violated antitrust laws. However, in doing so, the Court made clear that the bar committees'

> authority was limited to making recommendations to the Supreme Court. The court itself made the final decision to grant or deny admission to practice.

Hoover, 466 U.S. at 572-573.[14]

Where a state legislature undertakes this supervisory authority, it must be real. Private parties claiming immunity must be able to prove that the legislature has not simply "ratified," and left unattended, their anticompetitive conduct.

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[14]This Court stressed that there was a "detailed mandatory review procedure by which an aggrieved candidate could challenge the Committee's rating formula" (*Id.* at 573); that the "disappointed applicant" could seek "individualized review" by the court (*Id.* at 576); and "that under the law of Arizona only the State Supreme Court had authority to admit or deny admission to practice law." (*Id.* at 581). Here, the Alabama Legislature does not make decisions of who will sell where, especially with respect to implementing the private agreements.

V. THE COURT NEED NOT EXAMINE THE LEGISLATURE'S MOTIVES

Contrary to Alabama Power Company's response, Petitioners advocate examination of *what the legislature did* (*i.e.*, the legislation itself and the consequences of that legislation), not of the legislature's motivations. On their face, the Alabama Territorial Acts leave ample ground for the exercise of private, unsupervised utility discretion. Electric suppliers other than municipal electric suppliers may (not must) serve large customers outside city limits without regard to designated service territories and without regard to electric line duplication[15] -- the alleged articulated state policy. Municipalities may (not must) buy facilities of secondary electric suppliers

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[15]Ala. Code §§ 37-14-3(2)(3), 37-14-32(2)(3) (Appendix H, 77a; Appendix I, 102a).

within their 1984 corporate limits, but secondary suppliers may (not must) continue to serve large customers within those corporate limits.[16] Scrutiny of legislative motives is not required to determine that such discretion exists.

Moreover, passage of the Acts was subject to procedural irregulatory. The texts of the individual private agreements are not included in the language of the Acts.[17] There is no evidence that all of

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[16]Ala. Code §§37-14-4, 37-14-4(3); 37-14-33(3). (79-84a; 105-112a).

[17]Petitioners' Alabama counsel knows of no other instance wherein the Alabama Legislature incorporated into legislation by reference private agreements. The universal rule appears to be that incorporation by reference is limited to statutory provisions or public documents. Lawrence Filson, *The Legislative Drafter's Desk Reference*, §25.5 (1992). One Respondent points to the existence of statutes in other states enacting permanent boundaries or service areas for electric suppliers. Alabama Rural Brief at 3-4. Counsel notes, however, that none of these statutes incorporates by reference private, territorial agreements of individual suppliers.

A number of the states which Respondent cite as "providing for permanent boundaries or service areas for electric suppliers" actually involve ongoing supervision and revision by regulatory agencies. *See e.g.*, Ga. Code Ann. §46-3-13

the incorporated agreements were ever delivered to both houses of or considered by the Alabama Legislature. And, the private agreements never received the mandatory legislative readings, as did the Acts. (R3-78; Appendix 5) (in separate envelope). At minimum, these facts require strict adherence to the active supervision standard of *Midcal*.[18] This

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(Michie 1992); Iowa Code § 476.25 (1993); Minn. Stat. § 216B.39 (subdiv. 3)(1992 & Supp. 1993); N.C. Gen. Stat. §62-110.2(d)(2) (1994); Ohio Rev. Code Ann. § 4933.83(c)(Baldwin 1991); S.C. Code Ann. §58-27-650 (Law Co-op 1977 & 1993 Supp.); and Wis. Stats. § 196.495(b)(1993). If Respondent's purpose in citing these statutes is to suggest that lesser standards for competition in the electric utility industry should apply, *see* Cities' Petition, at 27-28. Indeed, there is renewed recent interest in possibilities for increased retail electric competition. *E.g.*, Peter Passell, *A Makeover for Electric Utilities*, New York Times, February 3, 1995, at D1; Phillip S. Cross, *Retail Wheeling -- Happy Motoring for State Regulators?*, Public Utilities Fortnightly, June 15, 1994, at 46.

[18]The district court quoted the stipulation of the parties in another case that the bills and delivered to were read in both houses of the Alabama Legislature (14a). However, not all of the agreements incorporated by reference in the Acts were enacted at the times of their "first readings." The legislature incorporated the Cullman Utilities Board/Cullman Electric Cooperative

scrutiny of primarily the language of the Acts does not unduly invade the legislative province where antitrust exemptions are at issue.

CONCLUSION

If Petitioners properly understand *Ticor*, the court below should be summarily reversed. Alternatively, the Court should grant *certiorari*. The lower court's decision permits states to approve private trade restraints without limitation so long as they act through legislation. The decision below not only raises questions concerning the application of the law, but

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Agreement by reference despite the fact that the agreement was never provided either to the Clerk of the House or to the Secretary of the Senate. Although evidence of this omission was submitted to the district court (R2-66), the court nowhere mentions whether the Alabama Legislature had the Cullman agreement before passing the legislation. Although resolving this point is not necessary for decision in this case, *Parker*, *Midcal* and *Ticor*, and also *Cantor*, would seem to command that legislation cannot exempt private parties from the antitrust laws without even having before them the agreements sought to be exempted.

more fundamentally raises the question of what the law is. Properly balancing of the dual interests of avoiding injury to the national commerce through enforcement of the antitrust laws, on one hand, and permitting valid state economic regulation, on the other, mandates this Court's review.

Respectfully submitted,

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